franchise areas when governmentally-imposed costs (both direct and indirect) are different?

(2) Does the geographic uniformity requirement bar the cable operator from individually negotiating for provision of service to an MDU such as a condominium association, an apartment owner, a hotel owner and the like in competition with SMATV and MMDS operators who may be offering similar deals?

(3) Does the geographic uniformity requirement bar a community-wide cable operator from lowering its price in response to a competitive price from a second cable operator or other multichannel provider that has not built (or does not serve) the entire franchise territory or that does not face the same governmentally-imposed costs (both direct and indirect) as the community-wide operator?

Although Congress's choice of the term "geographic area" rather than "franchise territory" in Section 623 (d) appears to have been deliberate, Nashoba believes the Commission should recognize that a single cable system serving multiple franchise territories may have differences in governmentally-imposed costs between those territories.[264] Therefore, where a single, technically-integrated system serves more than one franchise territory, the cable operator should be allowed to charge differing prices between the franchise territories, if it can

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[264]By "single cable system," Nashoba means a system whose signals originate from a common headend, where satellite, terrestrial microwave and broadcast television receive antennas are located. For these purposes, the fact that the headend may be linked to some or all of the cable distribution system by CARS microwave, fiber optical trunk, or a coaxial cable makes no difference. Such a system is a single system, even though portions of the system may have different channel capacity or may have different local origination programming. This is consistent with the definition of cable system in 47 U.S.C. § 522(7). Moreover, contrary to the implication of ¶ 115 of the Notice, all communities served by a technically-integrated system are not necessarily contiguous.

show that governmentally-imposed costs, whether direct or indirect, also differ between the territories. Second, Nashoba believes that cable operators should be free to negotiate individual arrangements with MDUs without being obligated to offer the same arrangement to every other potential MDU in the geographic area served by the system. The policy imperatives that militate for geographically uniform rates to individual consumers simply do not exist for MDUs. Third, Nashoba believes the ultimate objective of the 1992 Cable Act -- benefiting consumers -- is best served if the community-wide cable operator is given the option to meet the lower price of its competitor that faces lower governmentally-imposed costs or that serves only portions of the community.

Finally, with respect to Section 623(e) ("Discrimination; Services for the Hearing Impaired"), Nashoba believes that the regulatory authority granted therein is limited to the kinds of discrimination traditionally prohibited by other federal statutes (on the basis of race, sex, religious belief or national origin) and is not a broad charter for regulation of a cable operator's business-justified rate classifications.

B. Discussion.

1. Limited Exceptions to Geographic Price Uniformity Should Be Made For Cable Systems Serving More Than One Franchise Territory.

Historically, cable television systems have been regulated on a franchise-by-franchise basis. The franchise, granted by the applicable local governmental unit, allows the cable operator to use the public rights-of-way for its cable system. Subject to the preemptive effect of federal law, the franchising authority imposes various kinds of regulation on the cable operator. Among other things, this regulation affects the cable operator's costs of doing business in the franchise territory. Differences in franchise-imposed requirements can have a dramatic effect on differences between franchise territories in the cost of system operation. These costs can be both direct and indirect. For example, direct costs would be those costs that may be passed through and separately itemized on the customer's bill pursuant to existing law.[265] As is more fully set forth in part II.E. of these comments, supra, if the cable operator's "rate" for rate regulation purposes is considered to be only the charge for cable service imposed by the cable operator exclusive of taxes, franchise fees and other governmentally-imposed direct costs collected by the cable operator from the customer, then differences in these costs between franchise territories served by a common system will not place the cable operator in jeopardy under Section 623(d).[266]

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[265]See 47 U.S.C. § 544(d) (permitting separate itemization of the franchise fee amount, PEG channel expenses, and any other fee or tax imposed by the government on the transaction).

[266]To illustrate, suppose a cable operator serves two towns with a technically-integrated cable system -- Anytown and Everytown. The cable operator's charge for basic service is fifteen dollars per month. However, Anytown collects a five percent franchise fee from the cable operator, requires the cable operator to support PEG channels at an average monthly per

A franchising authority also has the ability, through franchise requirements, to impose significant indirect costs on a cable operator. For example, a franchising authority even in a relatively small community can impose a very substantial cost by requiring the cable operator to build all of its plant underground. A franchising authority, in enforcing customer service requirements pursuant to Section 632(a)(1) might attempt to require a local office or to dictate the hours that the office is open or the speed with which customer telephone calls are answered.

If a cable operator uses a single system to serve more than one franchise area and a particular franchise community imposes higher costs than another on the cable operator, there is no public purpose in prohibiting the operator from charging a higher price to subscribers in the community that receives those additional benefits.[267]

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subscriber cost of fifty cents and charges a two percent "wire utility tax" on the gross amount of the transaction, which the cable operator is required to collect. Everytown charges the same five percent franchise fee, but does not have the wire utility tax and does not require the cable operator to support PEG channels. The basic customer in Anytown gets a monthly cable bill of $16.78 ($15.00 basic service + $0.95 franchise fee + $0.50 PEG charge + $0.33 "wire utility tax"). The basic customer in Everytown receives a monthly cable bill of $15.95 ($15.00 basic service + $0.95 franchise fee). There is no violation of Section 623(d) because the cable operator's charge for basic service is the same; the difference between the amount of the two bills is solely the result of the differences between the governmentally-imposed direct costs.

[267]The Commission appears to recognize this distinction at ¶¶ 114 and 115 of the Notice. Nashoba agrees with the Commission's suggestion that the Congress did not intend unlimited cross-

There are is one additional limitation on mandated geographic rate uniformity that Nashoba believes are obvious but need to be mentioned. If a cable operator in one of the communities served by a technically-integrated system is subject to effective competition and, therefore, is not subject to rate regulation, the rates charged in that community should not be used as a benchmark against which rates in other communities served by the same technically-integrated system are measured for establishing compliance with Section 623(d). There is no indication that the intent of Congress was that deregulated rates in one community should dictate cable rates in other communities served by the same system. To the contrary, the essential premise in Section 623(d) is uniformity -- that uniformity of costs and uniformity of competitive environment should lead to geographic uniformity of rates.

2. Geographic Uniformity Should Not Be Applied To Individually-Negotiated Contracts With MDUs Such As Apartment Buildings, Hospitals And Condominium Associations.

A cable operator sells in a varying commercial environment -- even within the same community. While the major portion of a

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subsidies between communities served by the same cable system. On the other hand, as the Commission also observed, presumably the Congress' choice of "geographic area" rather than "franchise territory" was deliberate; and, therefore, it would not be consistent with Congressional intent to simply substitute "franchise territory" for "geographic area" under all circumstances. Thus, to the extent that there are non governmentally-imposed cost differences between communities served by the same cable system, Section 623 (d) does imply some potential for cross-subsidization.

cable operator's businesses may consist of month-to-month sales of cable television service to individual consumer households, cable operators also sell to institutional customers, such as apartment owners, hospitals, trailer parks and condominium associations on the basis of an individually-negotiated contract.[268] In some of these circumstances, the cable operator provides service to a large number of outlets for a single institutional customer (such as a hotel) in return for a fixed monthly payment from that customer.[269] The number of outlets served does not vary during the life of the contract, and the duration of the contract is for a number of years.

However, in other cases, the cable operator is forced to negotiate with an apartment owner, a condominium association, or a private community developer for the <u>right to serve</u> individual households living in that apartment building or planned community. In these circumstances, the owner, association or developer offers all multichannel service providers, including

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[268]Some franchises mandate that the cable operator provide free cable service to certain institutions, like schools, city hall, the fire station and even the municipal hospital. Clearly, the fact that free cable service is provided at certain locations pursuant to a franchise mandate cannot be used to put the cable operator in jeopardy under Section 623(d) if it does not provide free cable service at all similar locations served by the same cable system.

[269]For example, a hotel owner may contract for basic cable and one pay service to be supplied to all of its hotel rooms. The hotel owner advertises "free cable TV," and the cost becomes part of his general overhead. The hotel guest is not billed separately for cable service. The cable operator receives the same payment regardless of the occupancy rate of the hotel.

SMATV, MMDS and cable, the opportunity to negotiate for the exclusive right to offer service to households in the apartment buildings or private community but does not guarantee any particular number of subscribers and does not assume responsibility for paying the cable operator's bill.[270] An element of these contracts is the multichannel service provider's agreement as to the rates it will charge households within the affected buildings or community. Thus, in this situation, the apartment owner, condominium association or homeowners' association uses its control of access to regulate rates.

Rate-regulated cable operators should not be required to offer the same price terms to every MDU that is a customer or potential customer located in the area served by the cable system. A geographic uniformity requirement applied to such contracts would effectively prevent the franchised cable operator from negotiating individually with MDUs. The operator would be

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[270] While Section 621(a)(2) of the 1984 Cable Act, and various state and local cable access to premises statutes, would appear to preclude enforcement of such exclusivity provisions to exclude the franchised cable operator, in practice, courts have been loathe to mandate access for the cable operator absent the specific assent of the property owner. Compare Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir. 1992); Cable Investments, Inc. v. Woolley, 867 F.2d 151 (3rd Cir. 1989); Media General of Fairfax, Inc. v. Sequoyah Condominium Council, 737 F.Supp. 903 (E.D. Va. 1990); Cable Associates, Inc. v. Town & Country Management Corp., 709 F. Supp. 582 (E.D. Pa. 1989); and City of Lansing v. Edward Rose Realty, Inc., 481 N.W.2d 795 (Mich. App. 1992) with Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Inc., 835 F.2d 1359 (11th Cir. 1988); Cable TV Fund 14-A v. Property Owner's Association of Chesapeake Ranch Estates, Inc., 706 F.Supp. 422 (D. Md. 1989); Princeton Cablevision, Inc. v. Union Valley Corp., 195 N.J. Super. 257, 478 A.2d 1234 (1983).

forced to adopt a "take-it-or-leave-it" standard contract and contract price. The operator would not be able to adjust its price, or other terms of the contract that would be converted into price, to reflect the particular characteristics of the MDU it was serving.[271] Enforcement of Section 623(d) in this manner would decrease, not increase, the competition for this particular segment of the business, since the cable operator would erect a "price umbrella" that would protect SMATV and MMDS operators from having to compete vigorously; they would only need to beat the cable operator's area-wide price to win the contract. Thus, imposition of geographic uniformity on the cable operator would bring about a result contrary to the overall intent of Congress as stated in the 1992 Cable Act.

Moreover, there is no indication that Congress, in the 1992 Cable Act, intended to benefit any but individual residential cable customers. In seeking the right to serve MDUs, the cable operator almost always faces competition from SMATV operators and any MMDS operator which may be licensed to the community. Either of these competitors are reasonable substitutes for the franchised cable operator in delivering the same or substantially the same program channels to customers who reside in MDUs as is

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[271]The possible variations are many. Commercial accounts may be "trade outs," i.e., based on payments in kind, not in cash. A motel might agree to house out-of-town visitors for the cable operator in return for the provision of twelve channels of basic service to the rooms. In a condominium or planned community, a cable operator may agree to a multi-year rate freeze or may offer a grant in aid of construction instead of installing the CATV wiring itself.

recognized by the definition of "multichannel video programming distributor" contained in the Act.[272] The owners or managers of MDUs are sophisticated business entities who are fully capable of representing themselves competently in negotiations with the franchised cable operator: they have a choice of multichannel service providers, the value of the contract is high enough to merit their attention and effort, and they are experienced in negotiating with various vendors of services for their facilities. In short, this group of customers is not in need of any special legal protection.

Finally, if the Commission adopts Nashoba's suggestion that "effective competition" be determined separately for MDUs and for individual residential subscribers, a cable operator would be free to negotiate individually with each MDU if multichannel competitors were serving significant numbers of MDU customers. However, for the same reasons that unregulated rates in a franchise territory subject to effective competition should not be used as a benchmark for rates in other franchise territories

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[272]This was dramatically illustrated in a decision of the Maryland Court of Special Appeals, Town & Country Management Corp. v. Comcast Cablevision of Maryland, 70 Md. App. 264, 520 A.2d 1129 (1987), in which the court held that a SMATV operator's royalty payments to an apartment owner in Baltimore County, Maryland triggered a "favored nations" clause in an apartment access agreement between Town & Country and Comcast. In the favored nations clause, Comcast had agreed to match any payments made to an apartment owner by any "cable television company" in Baltimore County. Even though the SMATV offered one third the number of channels as Comcast and was not franchised, the court said the basic similarities between the services provided between the two companies made them both "cable television companies" within the meaning of the contract.

served by the same cable system, so individual per-unit rates mandated by an individually-negotiated MDU contract should not be a benchmark for per-household rates for non-MDU customers served by the same system.

3. A Cable Operator Serving An Entire Community Should Be Permitted To Meet The Price Of A Competitor That Is Not Required To Serve The Entire Community Or That Does Not Face The Same Governmentally-Imposed Costs.

A requirement of geographic price uniformity can be economically crippling to a cable operator that is partially overbuilt by another cable operator or that faces geographically-limited competition from another multichannel provider, especially if the second operator does not face other governmentally-imposed costs, such as local access/origination studios, institutional loops and the like. Typically, the competitor begins in the most attractive portion of the franchise territory. If the competitor does not serve the entire community or is otherwise free of certain governmentally-imposed costs borne by the community-wide operator, the competitor's lower costs can allow it to underprice the community-wide operator and still make a profit.[273] If forced to have a geographically

[273]An example of this is the City of Riviera Beach, Florida, which consists of an oceanfront strip of highrise buildings occupied by affluent residents on Singer Island with the balance of the city located on the mainland. The mainland portion of the city is low-density, and its residents are less affluent than those living on Singer Island. Telesat, the SMATV subsidiary of Florida Power and Light, sought to link all of the oceanfront properties with a coaxial cable so that they could be fed from a common headend located on one of the buildings. Telesat unsuccessfully sought to avoid the City's franchise requirement that Telesat, like Comcast, the community-wide cable operator,

uniform price, the operator must choose between maintaining its price and losing significant numbers of its customers in the overbuilt area, or lowering its price system-wide and losing significant total revenues. If the operator elects the latter course, it may be pricing below cost system-wide, an action which, if continued, will threaten the system's financial viability. While consumers in the non-overbuilt area might benefit in the short-run from lower prices, that benefit will be short-lived if the cable operator serving their neighborhood goes out of business as a result of being prevented from meeting its competitor's price on a geographically-selective basis.

While competition is desirable and is a stated goal of both the 1984 Cable Act and the 1992 Cable Act,[274] competition best serves the public when it is long term, not short term. Indeed, among the federal antitrust laws, which regulate economic competition generally, the one proscribing price discrimination (the Robinson-Patman Act) provides for a specific statutory exemption that allows a price difference to "meet an equally low price of a competitor."[275] In fact, the legislative history of Robinson-Patman shows that its drafters were concerned about striking a balance between prohibiting competitive price cutting

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serve the entire city including its less attractive portions. City of Riviera Beach v. Telesat Cablevision, Civil No. 87-8208-CIV-MARCUS (S.D. Fla. 1990).

[274]See 47 U.S.C. § 521(b) (1984); Pub. L. No. 102-385, 106 Stat. 1460, § 2(b).

[275]15 U.S.C. § 14(b).

entirely and allowing unlimited price cutting in which chain stores could drive independents out of business town-by-town through a pattern of geographic price discrimination.[276] In the Robinson-Patman Act, Congress struck a balance between preserving marketplace competition and protecting against predatory selective price cutting by writing a "meeting competition" safe harbor into the statute.[277]

To the extent that Section 623(d) is implemented to require geographically uniform pricing, it indirectly regulates competition between cable operators that have partially overbuilt each other or between a cable operator and any other multichannel video programming distributor that elects not to compete with the cable operator system-wide. Nashoba believes that in those circumstances in which a community-wide cable operator is overbuilt by a cable operator or other multichannel provider who does not serve the entire community or who otherwise experiences lower governmentally-imposed costs, the community-wide cable operator ought to have the ability to meet but not beat the competitor's price for similar service.

This ability to meet the competitive price in the overbuilt area would confer a long-term benefit on consumers in two ways: first, it would make it more likely that there would be vigorous

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[276]See Standard Oil Co. v. Federal Trade Comm'n., 340 U.S. 231, 259 n. 12 (1951) (quoting floor debate from the Congressional Record).

[277]See id.

price competition in the overbuilt area; and, second, it would make it less likely that the community-wide cable operator would be placed in financial jeopardy by a competitor that elected to contest only the prime neighborhoods among all those served by a single cable system.

To use an example, if a second cable operator overbuilt a neighborhood comprising thirty percent of the community-wide operator's homes passed and underpriced the community-wide operator by twenty percent, the community-wide operator has two unattractive choices if it is <u>not</u> allowed under Section 623(d) to meet a competitive price only in the overbuilt area: either (1) maintain its current price and experience a substantial loss of customers (and consequent loss of revenue) in the overbuilt thirty percent of its service area as customers switch to the overbuilder, or (2) match the overbuilder's price and experience both a twenty percent loss of revenue system-wide <u>and</u> a loss of some customers in the overbuilt area (who switch to the overbuilder for non-price reasons). The former action confers no consumer benefit (since the community-wide operator maintains its price level), and the operator may be placed in financial jeopardy depending upon how much of its customer base in the overbuilt area defects to the competitor. The latter action (a system-wide price cut) confers an apparent consumer benefit in the form of lower prices, but that benefit is likely to be short term at best. Ultimately, if the competitor has a lower cost structure because it has chosen to compete only in the prime neighborhoods of the franchise territory and the community-wide cable operator is required to maintain geographically uniform prices, the competitor will be able to underprice the community-wide operator and drive it out of business. Obviously, this outcome confers no lasting consumer benefit and is inconsistent with the objectives of the 1992 Cable Act.

On the other hand, if the community-wide operator is permitted to match the lower price of the competitor only in the area where competition is faced, it will experience some lost revenues from the overbuilt area (both from lower prices and from lost customers) but will not lose revenues system-wide and is less likely to be financially ruined by a decision to match a lower-cost competitor's prices. Although customers outside the overbuilt area may not realize an obvious benefit from competition inside the overbuilt area, customers inside the overbuilt area will realize such a benefit.[278] Nashoba thinks that this outcome is most favorable to consumers in the long run because it strikes the most advantageous balance between the unfettered freedom to have geographically differential prices and

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[278]The fact that a cable operator subject to Section 623(d) is rate regulated will preclude it from raising prices to customers in the non-overbuilt area to make up for losses in the overbuilt area. Thus, so-called cross-subsidization of customers in the overbuilt area by customers in the non-overbuilt area will not be possible unless sanctioned by rate regulatory authorities, an unlikely event. Moreover, since high prices encourage new entry into any area, the mere presence of a multichannel competitor in any portion of a franchise territory would tend to discourage price increases throughout the franchise territory, not just in the overbuilt portion.

a regulatory straightjacket that would prevent a community-wide cable operator from responding to an overbuilder's lower price without committing economic suicide. Moreover, not allowing the community-wide cable operator to beat its competitor's price on a geographically-selective basis realizes Senator Gorton's objective of barring pricing intended to "drive out competition."[279] The "competition," not the community-wide cable operator, will still be able to control pricing.

Finally, while most promotional rates are offered system-wide, it has long been industry practice to offer special promotional rates or other incentives to customers or potential customers living in a neighborhood that has just been wired for cable television or whose cable television wiring has just been rebuilt and upgraded by the cable operator. These promotions can be free or reduced-rate initial installation charges, discounted service charges for the first month or so-called "charter subscriber" rates, i.e., rates frozen for a period of years, but only for original charter subscribers. Because these promotions reflect a cable operator's entry into a neighborhood (or expansion of service offerings in the same neighborhood), their unavailability system-wide has virtually no effect on overall consumer welfare or on competition and should be viewed as a benign effort to promote cable service to a new group of

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[279]138 Cong. Rec. S14248 (Sept. 21, 1992) (statement of Sen. Gorton).

customers.[280] Indeed, chances are that customers in neighborhoods already served by the cable system enjoyed similar promotions when cable service was inaugurated in their neighborhoods as well. Nashoba believes that the Commission should exempt from geographic uniformity requirements promotions of no more than two months' duration and charter subscriber rate freezes offered in areas newly served by cable or newly rebuilt and upgraded.

4. Section 623(e) Is Designed Solely To Authorize Rate Discrimination In Favor Of Senior Citizens And Other Economically-Disadvantaged Groups And To Authorize Regulation Of Rates Charged For Equipment To Assist The Hearing-Impaired.

Reflecting the current practice of some cable operators to grant a "senior citizen discount," Congress has specifically protected such customer-based rate discrimination in Section 623(e). Congress has also specifically authorized a franchising authority to require the cable operator to supply equipment to hearing-impaired customers and to regulate the price charged for such equipment. Beyond that, Section 623(e) simply clarifies Congressional intent that the 1992 Cable Act does not prohibit franchising authorities from adopting other kinds of non-discrimination regulation. Based on the absence of any

[280] Moreover, a cable system rebuild, no matter how carefully done, often engenders temporary service outages and service deterioration, inevitably causing some erosion in the cable operators' goodwill with the affected customers. Promotions in a rebuilt area should also be seen as the cable operator's legitimate effort to recoup goodwill in a neighborhood whose cable service may have been adversely affected during the rebuild process.

legislative history supporting such a notion, Nashoba does not believe that this section constitutes a Congressional blessing of any comprehensive effort to regulate a cable operator's rate categories.

While franchising authorities and other governmental bodies undoubtedly have the authority to prohibit discrimination on the basis of race, religion, sex, or national origin, there is no indication in the legislative history of a Congressional intent to go beyond these traditional prohibitions of discrimination. Nor is there any legislative finding of any such discrimination on the part of cable operators. Therefore, Nashoba believes the correct application of this provision is only to protect "senior citizen" rates and other special rates for economically disadvantaged groups and to provide for the possibility of mandated furnishing of equipment to assist hearing-impaired cable customers at regulated rates.[281] On the other hand, franchising authorities must not be allowed to prohibit business-justified differential rates for various classes of subscribers which do not incorporate any such "suspect" types of discrimination.

VI. NEGATIVE OPTION BILLING

Section 623(f) of the Act provides that "[a] cable operator shall not charge a subscriber for any service or equipment that

[281]By the same token, given that the geographic uniformity provisions of Section 623(d) of the Act are applied on a system-wide basis, the fact that different franchises may provide differing senior citizen discounts, for example, cannot be a violation.

the subscriber has not affirmatively requested by name."[282] This provision was added to the 1992 Cable Act largely as a result of the marketing by a major cable operator of the Encore programming service, in which subscribers were provided with Encore, a new service not previously offered on any of the subscribers' existing tiers. Subscribers were immediately billed for this new service unless and until they called the cable system to cancel it.[283] As a "premium" programming service provided on a per-channel basis, Encore was not subject to rate regulation under the 1984 Cable Act. The negative option marketing of Encore directly led to lawsuits by at least ten states' attorneys general.[284] While there was tremendous consumer benefit in receiving a premium service for an unprecedented low price, the Congress deemed it appropriate to compel the cable operator to undertake the costly subscriber-by-subscriber marketing of such service in order to obtain affirmative acceptance of the service.

The Encore experience demonstrates the limits of the 1992 Cable Act's negative option provision. Specifically, a negative option should be deemed to occur only where subscribers are provided with and billed for a completely new program package or service, consisting entirely of services to which they did not

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[282]47 U.S.C. § 543(f).

[283]See 138 Cong. Rec. S14248 (Sept. 21, 1992) (statement of Sen. Gorton); see also Kate Maddox, "TCI Improves, But Old Image Lingers," Electronic Media, November 4, 1991.

[284]See, e.g., "Cable Concern Bows to Suits," New York Times, June 14, 1991, at D17.

already subscribe, and without the subscriber's affirmative request to do so (either orally or in writing). This test would fully encompass the Encore situation as a negative option, as Congress intended. In all other instances, the rearrangement of services would be subject to either the 1992 Cable Act's basic rate regulation provisions (if the change occurred on the basic service level and the cable system was not subject to effective competition),[285] the cable programming service rate regulation provisions (if the services in question are cable programming services),[286] or even a claim under the 1992 Cable Act's anti-evasion provisions on the basis of an imputed rate increase (e.g., less service for the same rate).[287]

The legislative history to the 1992 Cable Act's negative option prohibition makes clear that "[t]his provision is not intended to apply to changes in the mix of programming services that are included in various tiers of cable service."[288] Unless "negative option" is properly defined in this fashion, Congress' intent to allow "changes in the programming mix," which the Commission agrees is permitted, as well as cable operators' right to retier, would be jeopardized. For example, it is quite common and quite conceivable that a programming change would involve the

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[285] 47 U.S.C. § 543(b).

[286] Id. at § 543(c).

[287] Id. at § 543(h).

[288] Conf. Report at 65; see also Notice at ¶ 118.

addition (or substitution) of programming on an existing tier, and there is no evidence that Congress intended to foreclose this type of change. Moreover, requiring cable operators to remarket to every subscriber the reconfigured service following each programming change, including the addition or deletion of programming services, would be unduly burdensome upon cable operators, and would severely hinder the 1992 Cable Act's goal of "ensur[ing] that cable operators continue to expand, where economically justified, their capacity and the programs over their cable systems."[289]

Accordingly, the Commission should not define "negative option" as broadly as suggested, for example, by the Wisconsin Department of Justice, which has proposed to require downgrading and remarketing of customers upon launching a lifeline basic tier. Wisconsin's proposal would, among other things, require cable operators to notify each customer of "the elimination of a program channel or other item within" a cable service.[290] Thus, Wisconsin's proposal would essentially outlaw all retiering, a result that would flagrantly violate a fundamental cable operator right.[291] This type of practice is a typical programming change

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[289]Pub. L. No. 102-385, 106 Stat. 1460, § 2(b)(3).

[290]Special Order -- Billing for Unordered Cable Services (proposed), Wisconsin Department of Justice.

[291]See In re Community Cable 95 FCC 2d 1204 (1983), recon. den., 98 FCC 2d 1180 (1984). Moreover, as the Notice recognizes, Congress has not only upheld this right, it has even required retiering in certain cases. See Notice at ¶ 127.

that Congress has specifically permitted, and prohibiting or subjecting it to extensive remarketing requirements would be unduly burdensome. There would be little value to a cable operator's right to retier, which is unquestionable under the 1992 Cable Act, if any such tiering or deletion would be viewed as a prohibited negative option unless the service were remarketed to each subscriber of the tier. This would effectively eliminate the right to add or delete services because of the potential marketing cost and delay in implementing service.

Nashoba agrees, therefore, with the Notice's tentative conclusion that "a change in the composition of a tier that was accompanied by a price increase justified under our rate regulations would not be subject to the negative option billing prohibition."[292] We also agree with the Notice that the negative option provision does not "apply to system-wide upgrades in equipment accompanied by a justified price increase."[293] However, this definition cannot logically be limited to "justified" price increases. Although we in no way condone unjustified price increases, such increases have no logical nexus with negative options. The statute and legislative history make clear that it is the introduction and unauthorized extra billing of a new service, not the particular price charged, that triggers

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[292]Notice at ¶ 120.

[293]Id.

the negative option prohibition. If the price increase is "unjustified," the 1992 Cable Act establishes specific procedures to rectify such problems directly. There is no need for imposing the negative option prohibition in these cases, especially where there is no logical nexus between the rate increase and the negative option definition.

Accordingly, the Commission should clarify that the following practices are not negative options:

(1) Adding services to a subscriber's existing basic or non-basic service and simultaneously raising the price. This is a rate increase that may be subject to FCC standards, but not a negative option.[294]

(2) Deleting services from an existing basic or non-basic service without an appropriate rate reduction. This might be an implicit rate increase covered by the evasion section, but not a negative option.

(3) Dividing a subscriber's existing single service tier into multiple offerings and raising the total price. Again, this is a rate increase which may be subject to FCC standards, but not a negative option. The subscribers have been given the positive option not previously available to select only a portion of the prior offering.

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[294] See, e.g., 47 U.S.C. § 543(b)(7)(B) ("[a] cable operator may add additional video programming signals or services to the basic service tier").

(4) Dividing a subscriber's existing single service tier into multiple offerings at the same net price. This is not even a rate increase.

Thus, for example, the addition or deletion of programming services to or from existing basic or non-basic service tiers is not a negative option.[295] Similarly, a cable operator that divides an existing multichannel tier into two or more smaller tiers has not employed a negative option for those subscribers currently taking the large service package. These subscribers have been given the positive option not previously available to select only a portion of the prior offering. The Act permits retiering and, in some cases, may require it.[296] Accordingly, the Commission must provide sufficient flexibility for the implementation of service reconfigurations imposed by the statute, which, at a minimum, removes such reconfigurations from the negative option label.

Additionally, the offering on an a la carte basis of a cable network that was previously part of a regulated tier is not a negative option if the overall rate is revenue neutral. For example, if cable service "X" is offered as part of a tier for ten dollars, and the cable operator decides instead to offer "X" a la carte for one dollar and the remainder of the tier for nine dollars, no negative option has occurred, because subscribers

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[295] See, e.g., id.

[296] Id. at § 543(b)(7); see also Notice at ¶ 127.

have previously requested "X" and are not being subjected to a rate increase in connection of the separation of "X" from the tier.[297] Similarly, if the remainder of the tier continues to be priced at ten dollars and one dollar is charged for "X," this is also not a negative option, although two separate rate increases have taken place, triggering a potential "bad actor" complaint for the tier which now contains fewer channels with no reduction in price.[298] "X", which is now offered a la carte, would not be subject to rate regulation, but subscribers would be free to drop it at any time. Thus, adding to, changing, or splitting the preexisting programming mix is not a negative option, and the cable operator is therefore under no obligation to remarket each offering to its subscribers.[299] A negative option only occurs when a subscriber is delivered, and billed for, an entirely new service or package of services that was not previously part of the services delivered to that subscriber, and which the subscriber has not affirmatively requested by name.

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[297]Of course, the cable operator in this example could be subject to a franchising authority requirement to provide thirty days' advance written notice of such programming change. 47 U.S.C. § 544(h).

[298]With such an implicit rate change on the basic service level, the cable operator is subject to the further requirement to provide thirty days' advance notice to the franchising authority of the rate increase. Id. at § 543(b)(6).

[299]Id.

VII. EVASIONS

Section 623(h) of the Act requires the Commission to "establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this [rate regulation] section."[300] The term "evasion" is ripe with negative connotations -- it implies that the cable operator is violating the letter and the spirit of the 1992 Cable Act. Accordingly, the Commission must take care in defining what constitutes an evasion.

First, it is clear that retiering per se is not an evasion under the 1992 Cable Act. Rather, the statute is intended to prohibit "evasions that result from retiering."[301] If retiering itself were automatically an evasion, the "result from" language in Section 623(h) would be superfluous. The cable operator's right to retier remains unfettered even if inconsistent with local franchise requirements, since this long-established right[302] has been reaffirmed by the 1992 Cable Act. Indeed, because of the new statutory definition of minimum basic service,[303] which the Notice recognizes may require retiering,[304]

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[300] 47 U.S.C. § 543(h).

[301] Id.

[302] See In re Community Cable TV, Inc., 95 FCC 2d 1204 (1983), recon. denied, 98 FCC 2d 1180 (1984).

[303] 47 U.S.C. § 543(b)(7).

[304] Notice at ¶ 127.